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IN THE

Supreme Court of the United States

OCTOBER TERM, 1975

No. 75-1198

NOLDE BROTHERS, INCORPORATED, *Petitioner*,

v.

LOCAL NO. 358, BAKERY & CONFECTIONERY WORKERS UNION, AFL-CIO, *Respondent*.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

RESPONDENT'S BRIEF IN OPPOSITION

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The sole question presented [1] is whether a court or an arbitrator should decide a claim that a particular labor agreement requires payment of severance pay accrued

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[1] Petitioner does not seek review of the question on which Judge Widener dissented—the scope of the arbitrator's authority to consider arbitrability following referral. The Court of Appeals was unanimous in concluding that the matter be referred to arbitration.

during the contract term when the employee is severed after contract expiration. Review is unwarranted because the question arises solely from the Fourth Circuit's interpretation of the contract in this case, and is clearly answered under well-established doctrines of this Court.

This Court has recently reiterated the "now well-known presumption of arbitrability for labor disputes" and the need for reliance upon "the special expertise of the labor arbitrator, with his knowledge of the common law of the shop." *Gateway Coal* v. *Mine Workers,* 414 U.S. 368, 377, 379 (1974). In reliance upon these long-standing precedents and its own finding that the parties here had agreed upon an "all-encompassing arbitration clause" (A. 2) [2] to resolve contractual disputes, the Fourth Circuit correctly concluded that the arbitrator, rather than a court, had been entrusted with authority to decide this contract issue.

Petitioner claims, however, that a court should decide this particular contract dispute. The court below concluded that an arbitrator should; that conclusion follows this Court's mandate, announced in the most forceful language imaginable in *United Steelworkers* v. *Warrior & Gulf Nav. Co.,* 363 U.S. 574 (1960) and reaffirmed in *Gateway Coal* (414 U.S. at 377-378):

> "(a)n order to arbitrate the particular grievance shall not be denied unless it may be said with positive assurance that the arbitration clause is not

[2] The Court of Appeals properly described the arbitration clause here as "all-encompassing," for it had no limitations or exclusions whatever. Indeed, the clause is even broader than the "standard form" arbitration clause referred to by the Court in *United Steelworkers* v. *American Mfg. Co.,* 363 U.S. 564 at 565 & N. 1 (1960).

> susceptible of an interpretation that covers the asserted dispute. Doubts should be resolved in favor of coverage." *United Steelworkers* v. *Warrior & Gulf Nav. Co.* 363 U.S. 574, 582-583 (1960).

The decision of the Court of Appeals here was explicitly based on its reading of the particular agreement between the parties and not, as Petitioner claims, upon the view that the obligation to arbitrate arises solely by operation of law. The Court below concluded that "[w]e simply hold that the company must abide by that agreement [to arbitrate] even after the contract embodying it has terminated." (A. 10). Non non-contractual obligation was imposed upon the company. The Court of Appeals noted that:

> "The company does not deny that the contract by its terms contemplated arbitration of any dispute over severance pay. Thus is it clear that the company literally agreed to arbitrate any issue of its obligation for severance pay." A. 10.

The Court concluded that the parties intended that disputes as to severance pay were to be arbitrable "even if the contingency giving use to the dispute itself transpired after the expiration of the contract." (A. 9)

Certainly, the parties could have agreed that *all* determinations of rights created under their agreement were to be made by an arbitrator possessing "special expertise" in this area rather than by a relatively untutored court.[3] They could have agreed that employees

[3] Severance pay disputes of the type involved here have been "grist for arbitrators' mills" for many years. The overwhelming and long-standing view among labor arbitrators is that employees accrue severance pay and are entitled to the payment whether dismissed during the contract or at any time thereafter. It is the

were to accrue rights to severance pay during the term of the agreement and that those rights could be realized after the expiration of the comprehensive collective agreement. They could also have agreed that their arbitrator would decide disputes regarding the amount or appropriateness of severance pay in those instances. Since the "all-encompassing arbitration clause" between Petitioner and the union was certainly "susceptible of an interpretation" that such disputes were arbitrable, the Court of Appeals correctly concluded that the severance pay dispute should be decided by the arbitrator rather than a court.

The Court of Appeals' interpretation of the contract is consistent with this Court's decisions in *John Wiley & Sons, Inc.* v. *Livingston*, 376 U.S. 543 (1964) and *Piano & Musical Instrument Workers Union* v. *W. W. Kimball Company*, 379 U.S. 357 (1964). In *Wiley*, a union sought arbitration of its claim that a successor employer (Wiley) was not only obligated to honor the collective bargaining agreement of its predecessor (Interscience) for the balance of its term, but also was obligated to abide by certain provisions of the contract—including the severance pay provision—even after the agreement expired. The employer argued that it was not bound by the prior employer's agreement, but that even if it was, it was not required to arbitrate claims

labor arbitrator's background and familiarity with these normal expectations of the parties to a collective bargaining agreement that underscores the importance that questions of contract interpretation be decided through the contractually designated method. See, e.g., opinion of Willard Wirtz, *In re Brooklyn Eagle, Inc.*, 32 Lab. Arb. 156, 160-161 (1959); *H. K. Porter Co.*, 49 Lab. Arb. 146 (1967); note, *Termination of Collective Bargaining Agreements—Survival of Earned Rights*, 54 Northwestern L. Rev. 646, 647-48 (1959).

which "relate to a period beyond the limited terms of the agreement." *Id.* at 554. This Court ordered arbitration of the union's claims for post-expiration rights (*id.* at 555):

> "As to claimed rights 'after January 30, 1962' [the expiration date of the agreement], it is reasonable to read the claims as based solely on the Union's construction of the Interscience agreement in such a way that, had there been no merger, Interscience would have been required to discharge certain obligations notwithstanding the expiration of the agreement. We see no reason why parties could not if they so chose agree to the accrual of rights during the term of an agreement and their realization after the agreement had expired. . . .

In *Piano Workers*, this Court summarily reversed the Seventh Circuit's denial of arbitration for seniority claims made after the contract expiration date. The Seventh Circuit had expressly predicated its conclusion that arbitration was unavailable on the finding that there were no pre-expiration disputes, the very contention advanced by the instant Petitioner. The propositions involved were so well-established that this Court considered extended discussion unnecessary and ordered arbitration, citing only *United Steelworkers* v. *American Mfg. Co.*, 363 U.S. 564 (1960) and *Wiley*.[4]

[4] Nothing in this Court's opinion in *Howard Johnson* v. *Hotel Employees*, 417 U.S. 249 (1974), detracts from the applicability of *Wiley* and *Piano Workers*. Howard Johnson itself had never signed a contract; the seller (Grissom) in *Howard Johnson* conceded its obligation to arbitrate. Since here Petitioner, like Grissom, was itself a consenting party to an agreement to arbitrate, its obligation springs from its own express contractual undertaking and does not violate any countervailing public policy supporting the free transfer of capital. 417 U.S. at 255.

No labor policy is impaired by permitting the arbitrator rather than a court to decide the severance pay issue. To the contrary, this Court and the Board have repeatedly referred to the public policy favoring arbitration rather than judicial resolution of such contract disputes. Nothing in *Howard Johnson*, 417 U.S. 249 (1974), or in the solitary Labor Board decision cited by Petitioner suggests that "what the Union seeks here is completely at odds with the basic principles . . ." enunciated by this Court or the Board.[5] The Board held only that it was not a refusal to bargain for a party to refuse to arbitrate "post-contract grievances" after an agreement had expired.[6] That Board opinion does not suggest that a court rather than an arbitrator should decide contract claims concerning accrued rights under a pre-existing agreement.

The remainder of the Petition is devoted to a misleading recitation of the few lower court decisions allegedly analogous to the present case. The Fourth Circuit explicitly and accurately distinguished those cases in which arbitration was sought for claims that "on their face" were not based on the collective bargaining agreement itself, e.g., discharges after the expiration of the contract. (A. 12-13) Since the essence of the *Steelworkers Trilogy* is that arbitration is the favored mechanism where a dispute "on its face is governed by the contract,"[7] these courts were correct in refusing

[5] As noted, *Howard Johnson* merely reiterates this Court's concerns that legal doctrine not impede the public policy favoring the free transfer of capital and the resuscitation of moribund businesses. *Howard Johnson Company* v. *Hotel Employees*, 417 U.S. 249 at 261.

[6] *Hilton Davis Chemical Company*, 185 NLRB 241 (1970).

[7] *United Steelworkers* v. *American Mfg. Co.*, 363 U.S. at 568 (1960).

to order arbitration of claims that had no contractual predicate. Indeed, both the Second and Tenth Circuit opinions relied upon by Petitioner expressly distinguished claims based on accrued rights;[8] the District of Columbia case involved "negotiation" of a benefit, not an accrued right.[9] The overwhelming weight of authority from these and other lower courts supports the decision of the Court below.[10]

The main case relied upon by Petitioner, the decision of the Sixth Circuit in *I.A.M. Local Lodge 2369* v. *Oxco Brush Division*, 517 F.2d 239 (6th Cir. 1965), is clearly distinguishable since the parties there had contractually withdrawn from the arbitrator the authority to award "compensation, damages, or other redress to any employee or the Union." 517 F.2d at 242. Since the employees in *Oxco Brush* sought "com-

[8] *M.K.O. Transit Lines, Inc.* v. *Division No. 892*, 319 F.2d 488 (10th Cir. 1963) involved the terms of a new contract and the court expressly distinguished cases where ". . . the sustained arbitration was with reference to accrued though continuing rights under the terminated agreement." 319 F.2d at 491.

Flight Engineers Int'l Assoc., EAL Chapter v. *Eastern Air Lines*, 359 F.2d 303 (2d Cir. 1966) expressly notes that an arbitration board ". . . was still the forum for the assertion of rights which had arisen while the collective bargaining agreement was still in effect. . . . But no such rights are asserted here." 359 F.2d at 310.

[9] The Fourth Circuit distinguished *Milk Drivers Local 246* v. *Thompson's Dairy*, 489 F.2d 1272 (D.C. Cir. 1974): the unreported portion of the District of Columbia Court's memorandum made clear that no contract claim was made, since the company's only obligation was to negotiate. A. 13, n. 7.

[10] See, e.g., *Local Lodge No. 595, IAM* v. *Howe Sound*, 350 F.2d 508 (3d Cir. 1965); *Local 4, IBEW* v. *Radio Thirteen-Eighty, Inc.*, 469 F.2d 619 (8th Cir. 1972); *United Steelworkers* v. *H. K. Porter*, 64 LRRM 2202 (W.D. Pa. 1966).

pensation" (vacation pay), the arbitrator would have been powerless to resolve the dispute. Moreover, the *Oxco Brush* Court found in the union's favor on the merits in reliance on its own strong precedents dealing with the substantive issue of vacation pay. The Court's haste to decide the merits rather than refer it to an arbitrator with contractually limited power is therefore understandable, though inconsistent with this Court's decisions. *Oxco*'s analysis of the arbitration question is superficial and unpersuasive, failing to cite *Local Lodge No. 595, IAM* v. *Howe Sound Co.*, 350 F.2d 508 (3d Cir. 1965). *Howe Sound* is so clearly correct that our Petitioner earlier conceded, on *Howe*'s authority, that arbitration would be the proper forum for vacation disputes of the type involved there and in *Oxco*.[11] For these reasons, the *Oxco* decision is of limited consequence.[12]

Petitioner's notion that the question presented is "new" and its ramifications "immense" are merely exaggerated rhetoric commonly engaged in by one seeking review. In fact, the general propositions are "well-known", *Gateway Coal* v. *Mine Workers, supra,* and the application of those propositions to the particular

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[11] In its brief to the Fourth Circuit, Petitioner concedes that claims of the type involved in *Oxco* are arbitrable:

> "Obviously, where a right had accrued during the term of a contract, such as vacation earned under the terms of the contract, but not taken, the right to enforce such a vested right in arbitration arises under the contract and survives its termination. *Local Lodge No. 595 IAM* v. *Howe Sound Co.*, 350 F.2d 508 (3d Cir. 1965)." Brief for Appellee, p. 6.

[12] *OCAW International Union* v. *American Maize Products,* 492 F.2d 409 (7th Cir. 1974), cert. denied, 417 U.S. 969 (1974), also relied upon by Petitioner, involved a lockout following the expiration and not accrued rights.

question here has been addressed by this Court in *Wiley* and *Piano Workers.* Each of the Company's questions at pp. 13-14 of the Petition are therefore easily answered by reference to this Court's consistent line of authority:

1. The duty to arbitrate extends for the same time as the right to enforce the claim judicially. The court would hear these questions if the parties had not agreed to refer their disputes to a labor arbitrator and the arbitrator's authority is coterminous with that of a court. *Steelworkers Trilogy; Wiley; Piano Workers; Gateway Coal.*

2. The duty to arbitrate extends to each dispute that "on its face is governed by the contract" where it cannot be said "with positive assurance that the arbitration clause is not susceptible of an interpretation that covers the asserted dispute." *United Steelworkers* v. *American Manufacturing, Gateway Coal* v. *Mine Workers, United Steelworkers* v. *Warrior and Gulf Nav. Co.*

3. A party may limit its contract obligation to arbitrate by a "specific exclusion" from the arbitration clause. Otherwise, a party can no more terminate a contract obligation to arbitrate any more than it can terminate any other contract obligation it has undertaken. *Wiley; Piano Workers.*

4. Arbitration of a claim based upon the accrued rights of the employees under the previous agreement is proper where the arbitration clause is susceptible of interpretation that covers the dispute. *Gateway Coal; Wiley; Piano Workers.* A prominent authority, W. Willard Wirtz, long ago concluded that the employees

had a right to severance pay in precisely the circumstances Petitioner outlines. See *Brooklyn Eagle,* 32 Lab. Arb. 156 (1959).

5. A union may not strike if the underlying agreement so provides, either expressly or by implication. *Gateway Coal.*

By reason of the extraordinary clarity and forcefulness of this Court's many opinions in this area and of the carefully limited nature of the Court of Appeals' indisputably correct decision, review is unwarranted. There is no need for this Court to reiterate once again its consistent conclusion that arbitrators and not courts are to decide contractual disputes under labor agreements.

Respectfully submitted,

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